Supreme Court, U.S.
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No. 86-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UTAH POWER & LIGHT COMPANY,
Appellant

v.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, AND
IDAHO POWER COMPANY,
Appellees

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OF APPELLEE IDAHO POWER COMPANY

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Rules:

Sup. Ct. R. 16 . . . . . 1, 5

MOTION TO DISMISS

COMES NOW, IDAHO POWER COMPANY, Appellee, ("Idaho Power") and pursuant to Sup. Ct. R. 16 moves this court to dismiss the appeal of Utah Power & Light Company, ("Utah Power") of the final judgment of the Supreme Court of Idaho, entered on November 26, 1986, as 1986 Opinion No. 154 in the case *Utah Power & Light Company v. Idaho Public Utilities Commission,* ____Idaho____, 730 P.2d 930 (1986), for the following reasons and upon the following grounds:

I

NO FEDERAL QUESTIONS PRESENTED

The Idaho Supreme Court succinctly described the resolution of the dispute before the Idaho Public Utilities Commission by stating, "as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so." *Utah Power,* 730 P.2d at 935. Appellant Utah Power claims that the Idaho Public Utilities Commission order violates Utah Power's rights under the Fifth and Fourteenth Amendments to the United States Consitution. Utah Power alleges that by this order its property has been taken without just compensation. The alleged property right of which Utah Power claims to be deprived is its Certificate of Convenience and Necessity or franchised right to provide service in Butte County, Idaho. However, a fair reading of the decisions shows that nothing in the order of the Idaho Public Utilities Commission or in the decision of the Idaho Supreme Court visits a constitutional violation on Utah Power.

Appellee Idaho Public Utilities Commission in its Order No. 20136 dated November 27, 1985, *Appellant's Appendix D,* determined that both Appellant Utah Power and Appellee Idaho Power had valid Certificates of Public Convenience and Necessity for all five counties in which Appellee United States Department of Energy ("D.O.E.") operates. The Idaho Public Utilities Commission, after a meticulous inquiry into the evidence presented, determined that Appellee Idaho Power had the legal authority to serve D.O.E. at transmission voltage in Butte County, Idaho. *Id.* As the Idaho Public Utilities Commission ruled:

> [W]e base our decision on IPCo's (Idaho Power's) Certificate No. 268 and the fact that Idaho Power is currently *serving* the entire D.O.E. load. (emphasis original)
>
> The conflict in this case arises from the fact that Utah (Power) also has the legal authority to serve customers in Butte County at transmission levels. The question is therefore presented: **When two utilities, both of whom have the legal right to serve a particular area, are vying to serve that area, which utility or utilities should be given the authority to do so? Under the facts of this case we find that the utility that is currently and satisfactorily serving the disputed area may continue to do so.** (emphasis added) We further find that, the three-party agreement not withstanding, Idaho Power is the utility that is currently serving D.O.E. The record is replete with evidence that Idaho Power shoulders the full responsibility of providing D.O.E. with its day in and day out energy and power requirements. We also find that Idaho Power is properly performing this service under a certificate that allows it to

> "transmi[t], interchange and *supply*" high voltage electric power and energy. We find that permission to "supply" high voltage power and energy encompassed the right to deliver and provided that power and energy to D.O.E., the only such actual or potential high voltage customer contemplated by the certificate. (emphasis original)
>
> Another factor weighing in favor of our decision is the public interest considerations of the effect of our decision on the rates the citizens of Idaho must pay. To decide in favor of Utah would place an unnecessary and burdensome rate increase on not only (Idaho Power's) Idaho customers, but also on Utah Power and Light Company's Idaho customers.

See Appellant's Appendix A, pp. 49a, 50a.

The Idaho Public Utilities Commission's decision did not strip Appellant Utah Power of a certificated franchise service territory or in any way limit or qualify Utah Power's Butte County franchise. Rather, the Idaho Public Utilities Commission simply allowed D.O.E. to terminate a supply contract involving two properly certificated supplying utilities (Utah Power and Idaho Power) and choose between them as to which should be the sole supplier. D.O.E. chose Appellee Idaho Power, the utility which historically had been providing actual service. No "taking" of a property right was involved. As the Idaho Supreme Court observed:

> Two factual findings of the Idaho Public Utilities Commission are before us: First, the Idaho Public Utilities Commission finding that Idaho Power Company has a valid Certificate of Public Convenience

and Necessity to serve D.O.E. and; second, the Idaho Public Utilities Commission finding that the Idaho Power Company is currently supplying D.O.E.'s entire load, which finding supports the conclusion that the Idaho Power Company should be entitled to solely supply D.O.E. upon termination of the three-party agreement.

There is ample evidence in the record to sustain both findings of the Public Utilities Commission. The Commission correctly recognized that, while Idaho Power Company's amended certificate No. 268 gave it no general grant of authority to serve all customers in Butte County, the certificate nevertheless allowed Idaho Power to *supply* the power and energy at *transmission* level for the benefit of one customer — D.O.E. ... (emphasis original)

Rather, the Commission correctly decided that, as between two utilities with valid certificates to deliver energy at transmission voltage, the utility that is currently and satisfactorily serving the disputed area may continue to do so. Such a conclusion is mandated by the unique factual situation presented by this case — that of a heavy consumer dependent upon a continuous, reliable, large-scale supply of electricity.

We reiterate that this holding is in no way meant to implicitly approve the "pirating away" of customers encompassed within the geographical area contained in another utility's franchise area supported by a valid certificate of convenience and necessity. Instead, we are responding to the peculiarities of the situation before us, that is, where two utilities once shared the authority to service a customer and it is

> now necessary to determine which of the two shall continue the service.

Utah Power, 730 P.2d at 934.

The above-quoted language of the Idaho Supreme Court opinion underscores the Idaho Supreme Court's extensive attention to and careful review of the factual record before the Idaho Public Utilities Commission. The Idaho Supreme Court determined that the evidence competently and substantially supported the Idaho Public Utilities Commission's decision that where, as here, two utilities have valid certificates to deliver energy at transmission voltage to D.O.E., the utility which is currently and satisfactorily serving D.O.E. may continue to do so. Here that utility is Idaho Power. This holding does not disturb Appellant Utah Power's certificate for Butte County and does not constitute a taking of property without compensation.

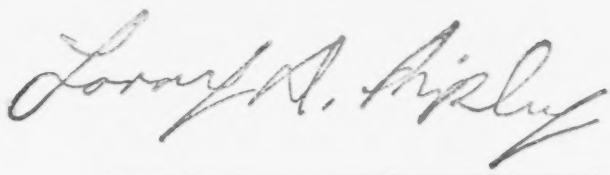
As provided by Sup. Ct. R. 16, a motion to dismiss an appeal from a state supreme court to the U.S. Supreme Court may be made on the grounds that the appeal "does not present a substantial federal question; ...or that the judgment rests on an adequate non-federal basis." *Id.* The decision of the Idaho Supreme Court, as outlined above, clearly rests on facts competent, substantial, and **independent** of Fifth and Fourteenth Amendment due process guarantees. There simply was not a "taking" of Utah Power's property; Utah Power still has a valid Certificate of Public Convenience and Necessity to serve in Butte County.

WHEREFORE, Appellee Idaho Power moves the Court to dismiss appeal No. 86-1656 for lack of jurisdiction, on the grounds that it does not present a federal question and

that the Idaho State Supreme Court decision rests on an adequate non-federal basis.

DATED this 14th day of May, 1987.

Respectfully submitted,



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